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No. 02-1776

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., and MITSUI MINING USA INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR JAPAN RESEARCH POLICY INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION

This brief[1] is submitted on behalf of the Japan Policy Research Institute (herein "*Amicus*"). The purpose of this *amicus curiae* brief is to urge the United States Supreme Court to grant *certiorari* of *Deutsch v. Turner*, 317 F.3d 1005, *as amended*, at 324 F.3d 692 (9th Cir. 2003) ["*Deutsch*"].[2]

This is a case of first impression in that the United States Supreme Court has never reviewed the issue of whether the Multilateral Treaty of Peace with Japan [1952] 3 U.S.T 3169, TIAS 2490 (1951) ("the 1951 Treaty")[3] abrogates the right of private United States citizens to sue private persons (including private business entities) for redress of personal injuries.

Petitioners are private citizens, former World War II American Prisoners of War, who were enslaved by private, wholly nonnationalized, Japanese companies for the private profit and enrichment of those wholly private Japanese companies who used Petitioners for the pursuit of the private businesses' own private enrichment. Respondents include

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1. *Amicus* states that this brief has been prepared in whole by Andrea R. Leavitt, Counsel for Japan Policy Research Institute. No person or entity, other than *Amicus*, or its counsel, have made a monetary contribution to the preparation or submission of the brief. All parties before the Court have consented in writing to the filing of this brief. A copy of that consent is submitted herewith.

2. The *Deutsch* opinion, as amended, is set forth in the Petition at pages 1-a through 68-a, and is incorporated herein by reference.

3. The full text of the 1951 Treaty is set forth in the Petition at pages 87-a through 121-a, and is incorporated herein by reference.

Mitsui, Mitsubishi, Nippon Steel, Ishihara Sangyo, and their related business entities. Petitioners have sued those companies, who also are global, private enterprise conglomerates doing business in California, to disgorge the profit they derived from Petitioners' slave labor.

Petitioners filed their suit in accordance with California Code of Civil Procedure Section 354.6, which expressly extends the statute of limitations for filing claims involving slave and forced labor during World War II. However, based upon its interpretation of the Multilateral Treaty of Peace with Japan [1952] 3 U.S.T 3169, TIAS 2490 (1951) ("the 1951 Treaty")[4] the Ninth Circuit's decision in *Deutsch*, *supra*, *denies* Petitioners their right to seek redress under Section 354.6.

Amicus could not find any American peace treaties that have been interpreted to deny the right of private individuals to pursue redress of personal injuries against private persons for torts and private profit, and does not believe that the United States Supreme Court has ever addressed that issue. Moreover, *Amicus* believes that the Supreme Court has never determined the issue of whether any United States treaty has abrogated a state-authorized right of a private United States citizen to sue another private person[5].

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4. The full text of the 1951 Treaty is set forth in the Petition at pages 87-a through 121-a, and is incorporated herein by reference.

5. The ironic, disparate, and unintended result of *Deutsch* and *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal. App. 4th 398, 129 Cal. Rptr. 2d 451 (2003) is that plaintiffs, such as Korean born *Taiheiyo* plaintiff Jeong, who during World War II were citizens of countries that were not signatories of the 1951 Treaty, will be allowed to proceed with suit for the identical injuries as the *Tenney* Petitioners,

(Cont'd)

The *Deutsch* decision is inconsistent with public policy that permits states to regulate the rights of their citizens to sue private persons in the United States or abroad. In addition, the Deutsch decision is inapposite to the California Court of Appeal decision in *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal. App. 4th 398, 129 Cal. Rptr. 2d 451 (2003) (review granted), which holds that the California statute is constitutional. The *Deutsch* court is not entitled to ignore the "principal expositors of State law" — state courts. *Moore v. Sims*, 442 U.S. 415, 429 (1979). *Taiheiyo* also finds that the 1951 Treaty is not a bar to an action by a private citizen.

Amicus respectfully submits its brief, so as to provide this Honorable Court with additional grounds and information supporting grant of the Petition for a Writ of *Certiorari* in the case of *Lester Tenney, et al. v. Mitsui & Co. (USA), Inc., et al.* ("*Tenney*") [Docket No. 02-1776], to settle important questions of law, furthering the interest of justice and uniformity of legal decision.

(Cont'd)

who will be foreclosed by virtue of being United States citizens during World War II. Another similar, and ironic result is that as a practical matter, the *Deutsch* decision favors human rights violations against American military personnel, including by tacitly favoring the economic interests of wealthy foreign corporations, for whom restitution which not be overly oppressive, over the rights of enslaved United States citizens. In essence, the opinion condones violations of the Geneva Conventions by private foreign companies. The instant cases before the Court beg the question of whether, as our national public policy, in sending our troops to wars and other foreign actions, we will not champion their rights or protect them, so long as their maltreatement is by private foreign persons and foreign corporations, and begs the question of whether, through decisions like *Deutsch*, we are exposing our military to exploitation and economic duress as a foreign slave labor force, while knowingly depriving them of the benefits of the Geneva Conventions.

STATEMENT OF INTEREST

Amicus is a completely independent, nonprofit, nonpartisan, public policy organization whose focus is to serve as a national resource and information base for those formulating policy responses, and to promote the understanding of Japan's political economic behavior and importance in world affairs and trans-Pacific international relations. *Amicus* is funded solely by membership dues, and does not take funds from either Japanese or American corporations. Its officials serve *pro bono publico* without salary. Its concept is not to spend time raising money but rather not to need it. Its reputation rests on three pillars: the reputations and integrity of its board of advisers, the fact that it cannot be bought, and the quality of its publications and conferences.

Amicus organizes national and regional forums and policy conferences for discourse by academicians, government officials, journalists and business leaders to analyze and discuss matters of current import to the U.S.-Japan relationship and to review significant issues in Japan's domestic and international affairs. *Amicus* also publishes and distributes papers, articles, and other publications concerning Japan's political economy. One of *Amicus*' activities is to promote serious empirical and inductive research, as distinct from the formal theory dispensed by university social science departments.

Amicus' interest in the case at bar is *Amicus*' belief that, rather than being solely a matter of domestic law and internal domestic affairs, *Deutsch* has far-reaching global impact beyond our borders, warranting the utmost scrutiny and Supreme Court review, because the decision in *Deutsch*

effectively establishes, defines, or amends United States global policy regarding the treatment and rights of American citizens, and the equities and balance between private economic industrial interests and private individuals.

The issue central to the *Deutsch* decision is of especial contemporary relevance with the increased interjection of United States' troops into global conflicts in a variety of capacities, including as "monitors", consultants, combatants, and peacekeepers, and exposing them to capture and detention as Prisoners of War. *Deutsch* may be negatively interpreted to mean that U.S. policy permits hostile governments to loan or give American Prisoners of War, and others, for the enslavement, exploitation, and enrichment of private persons with impunity.

REASONS FOR GRANTING THE PETITION

Certiorari is necessary for the following reasons:

1. to determine whether the 1951Treaty abrogated the rights of private citizens (Prisoners of War) to sue other private persons for personal injuries sustained;

2. to resolve the rights of states to enact laws for the protection and rights of their citizens;

3. to resolve the rights of private persons (Prisoners of War) to sue other private persons who are foreign non-governmental entities, who may exploit or who have exploited the individual citizens for private financial enrichment; and

4. to protect United States' military and other United States citizens from human rights violations, including their enslavement for private economic profit.

This is a case of first impression in that the United States Supreme Court has never reviewed the issue of whether the 1951 Treaty with Japan took away the right of private United States citizens to sue private persons (including private foreign business entities) for redress of personal injuries, and the Supreme Court may never have determined the issue of whether any United States treaty has taken away that right.

In denying Petitioners' right under California law to sue solely private persons for recovery for personal injuries, the basis for the Ninth Circuit ruling in *Deutsch* was that court's reasoning that the 1951 Treaty precluded private citizens from bringing tort claims against private Japanese companies. *Amicus* believes that the basis for the Ninth Circuit's ruling was erroneous.

Scrutiny of the 1951 Treaty discloses no express or implied intention to preclude common law tort claims for personal injuries incurred by American slaves from the conduct perpetrated against them by private Japanese corporations who enslaved them during World War II. Rather, the 1951 Treaty's immunity protection is specifically and expressly limited to claims against:

> Japan and its nationals arising out of acts taken by Japan and its nationals *in the course of the prosecution of the war*.

1951 Treaty, Paragraph 14(b), *supra*, 3 U.S.T. at p. 3183 (Emphasis added). A review of Petitioners' claims reveals

that Petitioners have not made any claims, nor sought to recover, against "Japan and its nationals arising out of acts taken by Japan and its nationals *in the course of the prosecution of the war*".

The claims before this Court are those of American citizens who were enslaved during World War II by Japanese companies (and their related business entities, and which include American corporations) for acts by those Japanese private, business enterprises *for unjust economic enrichment from the American slave labor*[6], not for the prosecution of war — but rather the enslavement of a free labor force so as to derive a private, financial, business profit. The *Deutsch* Petitioners seek disgorgement of Respondents' economic profits from Petitioners' slave labor.

Certiorari is warranted to resolve the appropriate analysis of federal preemption with regard to Section 354.6, as applied to the cases at bar. The *Deutsch* court ruled directly in contravention of the decision by the California Court of Appeal for the Second District in *Taiheiyo*, *supra* n.5, an action by a plaintiff who was a Korean national at the time of World War II. That appellate court held that Section 354.6 is procedural in nature only, is not preempted by treaty or other law, and that it imposes, at most, merely an incidental or indirect effect on foreign relations. The California Court

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6. Article 31 of the Geneva Convention Relating to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. 846 (1929), allowed Prisoners of War to be forced to do labor, but *expressly precluded* such labor from having any connection with the operation of the war. Thus, Respondents will be hard-pressed to argue that their actions were undertaken "in the course of the prosecution of the war" without expressly admitting a violation of the Geneva Convention, a concession that Respondents have yet to make.

of Appeal in the Fourth District decision of *Mitsubishi Materials Corp. v. Superior Court*, 106 Cal. App. 4th 39, 130 Cal. Rptr. 2d 734 (review granted) found the statute to be substantive and not procedural[7], but did not rule on the issue of preemption. *Id.*, 106 Cal. App. 4th at 59, 130 Cal. Rptr. 2d at 749. The *Deutsch* decision ignored the rights of states to interpret state statutes in the first instance, violating basic precepts of federalism. In addition, the Deutsch decision directly conflicts with the California state appellate decision in *Taiheiyo*, *supra*, which holds that the California statute is constitutional, and that the 1951 Treaty is not a bar to an action brought by a plaintiff who was a Korean national at the time of his enslavement. The Deutsch court is not entitled to ignore the "principal expositors of State law" — state courts. *Moore v. Sims*, 442U.S. 415, 429 (1979). The *Deutsch* decision should be set aside on both of these grounds.

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7. The California Supreme Court has granted Petitions for Review in *Mitsubishi Materials* [*Mitsubishi Materials Corp. v. Superior Court*, 133 Cal. Rptr. 2d 147, 2003 Daily Journal D.A.R. 4798 (Cal., Apr 30, 2003) (NO. S114470)] and *Taiheiyo Cement* [*Taiheiyo Cement Corp. v. Superior Court*, 133 Cal. Rptr. 2d 147, 66 P.3d 1231, 2003 Daily Journal D.A.R. 2776 (Cal., Apr. 30, 2003) (NO. S113759)] to resolve this conflict.

CONCLUSION

The novel issues presented by *Deutsch* have significant, direct, and immediate impact on United States' public policy regarding the balance of the economic interests of wealthy foreign corporations against the rights of United States' citizens, as well as on the United States' support of its Armed Forces enslaved by private persons.

Grant of *certiorari* is necessary to address and resolve disparities in application of preemption analysis, as well as the authority of the states to grant their citizens the right of redress for tortious injuries. Review is necessary to determine the United States public policy regarding human rights violations against their citizens, and in particular our troops, not only by sovereign foreign nations, but by private foreign persons.

Amicus respectfully requests that this Honorable United States Supreme Court grant Petitioner Lester Tenney's Petition for a Writ of *Certiorari* and to reverse the decision of the Court of Appeal of the Ninth Circuit.

Respectfully submitted,

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